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Foo Yee Construction Sdn Bhd v Vijayan a/l Sinnapan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-02(NCVC)(W)-1089–05 OF 2013
ALIZATUL KHAIR, ABDUL AZIZ ABDUL RAHIM AND VARGHESE GEORGE JJCA
15 MAY 2014

Contract — Specific performance — Damages — Respondent prayed for specific performance of building contract — Alternative prayer for damages for late delivery of vacant possession if specific performance not granted — Trial court declined grant of specific performance but held appellant in breach of contract and awarded damages naturally flowing from breach — Whether trial court wrong to have found breach of contract when respondent never pleaded issue or asked for rescission of contract — Whether damages payable to respondent restricted to liquidated damages formula agreed between parties — Whether respondent's failure to insist on strict compliance with completion deadline under contract and delay in filing action for specific performance set time at large

The respondent sued the appellant in the High Court for an order for specific performance of a building contract for the construction of a bungalow. The appellant had completed 85% of the construction before its work stalled largely due to problems with subcontractors. Under cl 15 of the contract if the appellant failed to deliver vacant possession of the house to the respondent within the stipulated time-frame, it had to pay the respondent agreed liquidated damages calculated from day to day at 10%pa on the sum the respondent had already paid the appellant. The respondent was entitled, but did not exercise the option, under cl 10 to give written notice to determine the contract if the appellant, inter alia, wholly suspended construction without good cause. The appellant's pleaded case was that it was at all times ready and willing to complete performance. Alternative to its primary claim for specific performance, the respondent prayed for damages in lieu of specific performance 'for the continued delay in handing over vacant possession until full payment'. The trial judge declined to grant an order for specific performance and instead held the appellant to be in breach of contract. On that premise, she ordered the appellant to pay the respondent damages comprising the market value of the building, reimbursement of rentals the respondent had incurred and the refund of mortgage — reducing term assurance premiums and legal fees on the loan agreement the respondent had paid. In the instant appeal against that decision, the appellant argued that the trial judge erred in holding that a breach of contract had occurred when that was never the respondent's pleaded case. The respondent had never sought a declaration that the contract had been rescinded or terminated but had only sought specific

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A performance or damages in lieu thereof. It was also contended that the damages the court could grant was limited to the liquidated damages the parties had agreed to in cl 15 of the contract and could not include what the trial court had granted.

B **Held**:

(1) The respondent had clearly prayed for an order for damages in lieu of specific performance for late delivery and not for damages arising independently. The trial judge wrongly held that since the appellant was C 'not capable of performing' its obligations it had breached the contract and since no specific performance was ordered by the court, cl 15.1 did not apply and that the respondent was entitled to damages arising naturally from the breach (see paras 20 & 22).

D (2) The respondent did not seek rescission of the contract but instead sought its performance. There was no prayer for an order for damages for breach of contract. The trial had all along proceeded as an action for specific performance. Parties were bound by their pleadings and the court was not entitled to decide on an issue not pleaded. If the court declined to grant E the order for specific performance, the damages in lieu necessarily had to be in the nature of the reasonable costs or expenses incurred to complete the performance and not to restore the respondent to a situation of 'status quo ante'. Any damages recoverable was limited to the amount derived from applying the expressly agreed liquidated damages formula set out in F cl 15.2 of the contract. The respondent did not challenge the adequacy or reasonableness of that clause and it was the court's view that the formula spelt out in cl 15.2 was fair and reasonable in the circumstances (see paras 24, 27, 30 & 38).

G (3) The trial judge had disregarded the evidence of SD2 that the appellant was willing and able to complete and deliver the house according to the contract subject to appointment of new subcontractors. There was failure to consider that there had been substantial completion of the works and also failure to make necessary consequential adjustment for the benefit or advantage the respondent had thereby enjoyed. There was no rationale H for the heads of damages awarded by the trial judge (see paras 25 & 28–29).

(4) As the respondent never issued to the appellant a written notice of termination of the contract, he could not rely upon cl 10.3 of the I contract. All the terms of the building contract, including cl 15.2, therefore remained binding upon the parties (see paras 33–34).

(5) Despite the existence of a 'time is of the essence' clause in the building contract, the respondent by his conduct did not insist on strict compliance with the deadline (in November 2008) for handing over of

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vacant possession but had waited until 2012 to commence his action. In the circumstances, time was set at large (see para 37).

[Bahasa Malaysia summary

Responden menyaman perayu di Mahkamah Tinggi untuk perintah pelaksanaan spesifik kontrak bangunan untuk pembinaan banglo. Perayu telah siap 85% daripadaa pembinaan tersebut sebelum kerjanya diberhentikan sebahagian besarnya akibat masalah dengan subkontraktor. Di bawah klausa 15 kontrak jika perayu gagal untuk memberikan milikan kosong rumah kepada responden dalam tempoh masa yang ditetapkan, ia kena membayar responden ganti rugi ditetapkan yang dipersetujui yang dikira dari hari ke hari pada 10% setahun ke atas jumlah yang responden telah bayar kepada perayu. Responden berhak, tetapi tidak melaksanakan opsyen tersebut, di bawah klausa 10 untuk memberi notis bertulis untuk menentukan kontrak jika perayu, antara lain, menggantung keseluruhan pembinaaan tanpa alasan kukuh. Kes yang diplid oleh perayu adalah bahawa ia pada kesemua masa bersedia dan sanggup untuk menyiapkan kerja. Sebagai alternative kepada tuntutan utamanya untuk pelaksanaan spesifik, responden memohon ganti rugi sebagai ganti pelaksanaan spesifik 'for the continued delay in handing over vacant possession until full payment'. Hakim bicara menolak daripada memberi perintah untuk pelaksanaan spesifik dan sebaliknya memutuskan perayu memungkiri kontrak. Atas asas ini, dia memerintahkan perayu membayar kepada responden ganti rugi yang terdiri nilai pasaran bangunan tersebut, pembayaran balik sewa yang ditanggung responden dan bayaran balik gadai janji — mengurangkan premium jaminan jangka dan fi undang-undang ke atas perjanjian pinjaman yang telah dibayar oleh responden. Dalam rayuan ini terhadap keputusan tersebut, perayu berhujah bahawa hakim bicara tersilap dalam memutuskan bahawa kemungkiran kontrak telah berlaku sedangkan ia bukannya kes yang diplidkan oleh responden. Responden tidak pernah memohon perisytiharan bahawa kontrak telah dibatalkan atau ditamatkan tetapi hanya memohon pelasanaan spesifik atau ganti rugi sebagai ganti. Ia juga dihujahkan bahawa ganti rugi yang dapat diberikan oleh mahkamah adalah terhad kepada ganti rugi ditetapkan yang pihak-pihak bersetuju dalam klausa 15 kontrak dan tidak boleh memasukkan apa yang diberikan oleh mahkamah bicara.

Diputuskan:

(1) Responden telah memohon dengan jelas untuk perintah ganti rugi sebagai ganti pelaksanaan spesifik untuk pemberian lewat dan bukan untuk ganti rugi yang berbangkit secara berasingan. Hakim bicara memutuskan secara salah bahawa memandangkan perayu 'not capable of performing' tanggungjawabnya ia telah memungkiri kontrak dan memandangkan pelaksanaan spesifik tidak diperintahkan oleh mahkamah, klausa 15.1 tidak diguna pakai dan bahawa responden

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berhak kepada ganti rugi yang berbangkit secara semula jadi daripada kemungkiran (lihat perenggan 20 & 22).

(2) Responden tidak memohon pembatalan kontrak tetapi sebaliknya pelaksanaannya. Tidak terdapat permohonan untuk perintah ganti rugi untuk kemungkiran kontrak. Perbicaraan selama ini telah diteruskan untuk pelaksanaan spesifik. Pihak-pihak terikat dengan pliding mereka dan mahkamah tidak berhak untuk memutuskan ke atas isu yang tidak diplidkan. Jika mahkamah menolak untuk memberikan perintah untuk pelaksanaan spesifik, ganti rugi sebagai ganti adalah perlu bersifat kos yang munsabah atau perbelanjaan yang ditanggung untuk menyiapkan pelaksanaan dan bukan untuk memulihkan responden kepada keadaan 'status quo ante'. Apa-apa ganti rugi yang boleh diperolehi semula adalah terhad kepada jumlah yang berbangkit daripada penggunaan formula ganti rugi ditetapkan yang dipersetujui secara nyata yang ditetapkan di dalam klausa 15.2 kontrak. Responden tidak mencabar kelayakan atau kemunasabahan klausa tersebut dan ia adalah pandangan mahkamah bahawa formula yang dinyatakan di dalam klausa 15.2 adalah adil dan munasabah dalam keadaan ini (lihat perenggan 24, 27, 30 & 38).

(3) Hakim bicara telah tidak memperdulikan keterangan SD2 bahawa perayu sanggup dan boleh menyiapkan rumah mengikut kontrak tertakluk kepada pelantikan subkontraktor-subkontraktor baru. Terdapat kegagalan untuk mempertimbangkan bahawa terdapat penyiapan kerja yang substansial dan juga kegagalan untuk membuat pelarasan yang berbangkit yang perlu untuk kepentingan atau kelebihan yang dinikmati oleh responden. Tidak terdapat kerasionalan untuk kepala ganti rugi yang diawardkan oleh hakim bicara (lihat perenggan 25 & 28–29).

(4) Memandangkan responden tidak pernah mengeluarkan kepada perayu notis bertulis penamatan kontrak, dia tidak boleh bergantung ke atas klausa 10.3 kontrak. Kesemua terma kontrak bangunan, termasuk klausa 15.2, oleh itu kekal mengikat ke atas pihak-pihak (lihat perenggan 33–34).

(5) Meskipun terdapat kewujudan klausa 'time is of the essence' dalam kontrak bangunan, responden dengan tingkah lakunya tidak mendesak ke atas pematuhan ketat dengan tarikh akhir (dalam bulan November 2008) untuk pemberian milikan kosong tetapi telah menunggu sehingga 2012 untuk memulakan tindakannya. Dalam keadaan ini, masa telah ditetapkan pada amnya (lihat perenggan 37).]

Notes

For cases on damages, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6398–6407.

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Cases referred to

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)
Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)
Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)
Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445, FC (refd)
Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd [2000] 3 MLJ 310, CA (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)
Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd) [2005] 4 MLJ 101, CA (refd)

Legislation referred to

Contracts Act 1950 s 74

Appeal from: Civil Suit No 22NCVC-110–4 of 2012 (High Court, Alor Setar)

Ang Khoon Cheong (C P Ang & Co) for the appellant.
Mohamad Fadzaial bin Ab Latif (Vignesh a/l Perumal with him) (Farid Aziz & Co) for the respondent.

Varghese George JCA (delivering judgment of the court):

[1] This and the further five appeals listed below were heard by us on 4 December 2013.

(a) K-02(NCVC)(W)-1086–05 of 2013
Yee Construction Sdn Bhd
v
Muthusivan a/l Ramakrishnan & 1 lagi

(b) K-02(NCVC)(W)-1087–05 of 2013
Foo Yee Construction Sdn Bhd
v
Chia Ah Bee

(c) K-02(NCVC)(W)-1088–05 of 2013
Yee Construction Sdn Bhd
v
Saravanan a/l Ramachandra & 1 lagi

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(d) K-02(NCVC)(W)-1090–05 of 2013
Yee Construction Sdn Bhd
v
Ananthy a/p Marutha Muthu & 1 lagi

(e) K-02(NCVC)(W)-1091–05 of 2013
Foo Yee Construction Sdn Bhd
v
V Ravindran a/l Sinnapan

[2] It was agreed by the parties that our decision in this appeal would bind and be applicable in respect of the other appeals.

The appeals before us were against the decision of the learned trial judge at the Alor Setar High Court, where similarly one decision of the court was agreed to bind all the respective respondents here.

[3] The respective respondents here were the plaintiffs at the High Court and in their separate suits had named the following as the defendants:

(a) ECK Development Sdn Bhd — *the first defendant*; and

(b) Foo Yee Construction Sdn Bhd — *the second defendant*.

After a full trial the learned trial judge had dismissed the plaintiffs' action brought against the first defendant. There was no appeal presented against that part of the judgment of the High Court.

[4] With respect to the second defendant, the learned trial judge dismissed the plaintiffs' prayer for an order of specific performance. However the court proceeded to hold that the second defendant was in breach of contract and on that premise ordered the second defendant to pay the plaintiffs damages.

[5] For convenience of reference, the parties will be referred to in this grounds as they were at the High Court.

BACKGROUND

[6] On 6 November 2006 the plaintiff entered into two agreements.

The first was with the first defendant for the purchase of a piece of land described as Plot 614 measuring 3605sqft for a purchase consideration of RM63,464 ('sale and purchase agreement').

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The second was with the second defendant for the construction of a single-storey bungalow on the above described Plot 614 for a contract price of RM90,269 ('building contract'). A

[7] It was not in dispute that the total purchase consideration for the land under the terms of the sale and purchase agreement had been settled by the plaintiff with the first defendant as of 1 December 2006. B

Evidence led in court show that the plaintiff (together with another had obtained a loan in the sum of RM147,482 for purposes of the purchase of land and construction of the bungalow on Plot 614 from AmBank (M) Bhd on the security of a third-party assignment of the sale and purchase agreement in favour of the said financier (the 'loan agreement — third party' and 'assignment — third party' are both dated 23 November 2006). C

[8] Documents admitted in evidence also show that the progress of the *construction of the building had progressed up to 85% of the works* and a total sum of RM76,728 towards the construction cost had been paid to the second defendant as of 10 May 2007. D

[9] By cl 15.1 of the building contract, vacant possession of the building with water and electricity connected was to be handed to the plaintiff within 24 calendar months of '... the date of acceptance of the loan by the owner (Plaintiff) or within such other period as may be decided by the Contractor's (2nd Defendant's) consultant.' E F

It was not in dispute that the 24 months deadline for delivery of the building was to be calculated from the 15 November 2006 (the date of the notice/demand by second defendant for the first release of progress payment from the approved loan sum) and accordingly the building was to be completed and delivered by *14 November 2008*. G

[10] This action was filed by the plaintiff on *29 April 2012*.

Even at the date of trial the construction of the building had yet to be completed. SD2, the witness for the second defendant however testified that the construction works had been substantially completed as reflected by the 85% progress payment releases that had been paid to the second defendant. According to this witness certain financial issues and in particular difficulties encountered with subcontractors had prevented the works from being fully completed. No definite date for hand over of vacant possession could be given as yet. H I

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[11] The learned trial judge, as alluded to above, held that the second defendant had committed a breach of the contract and ordered the second defendant to pay the plaintiff damages in the following terms:

(a) the 'market value of the building'; this was qualified as follows '... the contract price of the building contract as the minimum price of the bungalow would have fetched on the market and that is the amount of damages allowed';

(b) reimbursement of rental sum (as in the case of some of the plaintiffs), where documents such as tenancy agreements or receipts had been tendered in evidence;

(c) refund of mortgage reducing term assurance premiums ('MRTA') that had been paid; and

(d) refund of legal fees on loan agreements.

BEFORE US

[12] The *second defendant* appealed against the whole of the decision of the High Court.

There were two principal contentions advanced in this respect. *Firstly* it was submitted that the learned trial judge fell into a fundamental error when Her Ladyship had held that there was a breach of contract when that was never the pleaded case of the plaintiff at all in this action.

It was highlighted that there was no alternative prayer in the suit for the contract to be declared as rescinded or terminated for non performance. The only relief sought was for specific performance and for 'damages in lieu' if such order was not granted by the court.

[13] *Secondly*, it was counsel's contention that in any event, whatever damages to be allowed (whether in lieu of specific performance or otherwise) was contractually limited to the liquidated damages as expressly agreed and set out in cl 15.2 of the building contract, that is for the period of delay in completion and handing over of the building.

The award of damages, in terms of the 'market value of the building', repayment of rentals, MRTA and legal fees, as ordered by the learned trial judge was therefore wholly unsustainable.

[14] Counsel *for the plaintiff* on the other hand submitted that the learned trial judge was correct in holding that in all the circumstances of the matter, there had been a breach of contract committed by the second defendant and accordingly pursuant to s 74 of the Contracts Act 1950 the plaintiff was

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entitled to be awarded damages for all loss and expenses which naturally arose in the usual course of things. A

[15] It was also counsel's argument that as there had occurred a default in the delivery of vacant possession, it was open to the plaintiff to rely on cl 10.3 of the building contract and accordingly the damages recoverable from the second defendant was not limited to liquidated damages as stipulated or restricted by cl 15.2 of the same agreement, in any event. B

OUR ASSESSMENT C

[16] The pertinent starting point for our consideration was of course the pleadings by the parties.

The material parts of the plaintiff's claim and the relief sought were as found at paras 10, 11 and 12 and the prayers following that, in the statement of claim which are reproduced below: D

(10) Tetapi sehingga ke hari ini, Defendan-Defendan telah gagal dan/atau enggan meneruskan dan menyempurnakan dengan binaan hartanah tersebut serta telah gagal menyerahkan milikan kosong hartanah tersebut dalam masa sepertimana yang telah dicadangkan oleh Defendan-Defendan melalui 'Perjanjian Jual-Beli' dan 'Perjanjian Kontrak Bangunan'. E

(11) Akibatnya, Plaintif terpaksa menangggung rugi dan perlu membayar sewa rumah dan terpaksa menanggung beban faedah bank atas sebab kelewatan Defendan-Defendan untuk menyiapkan dan menyerahkan milikan kosong hartanah tersebut dalam tempoh yang ditetapkan. F

(12) Plaintiff telah melalui peguamcaranya Tetuan Farid Aziz & Co telah memberi notis bertarikh 09hb April 2012 kepada Defendan-Defendan bahawa Plaintiff inginkan Perlaksanaan Spesifik. G

OLEH YANG DEMIKIAN, Plaintiff menuntut daripada Defendan-Defendan:

(i) Pelaksanaan Spesifik (Specific Performance);

(ii) Ganti rugi alternative (Damages in-lieu) atas Pelaksanaan Spesifik bagi kelewatan penyerahan milikkan kosong yang masih berjalan sehingga penyelesaiaan penuh; H

[17] The defence to the aforesaid claim was set out at paras 9 and 10 of the second defendant's statement of defence and was in the following terms: I

9 Defendan Kedua sedang dan masih meneruskan dengan kerja-kerja pembinaan banglo tersebut. Pada semua masa berkenaan Defendan Kedua sudi dan bersedia melaksanakan obligasinya kepada plaintiff di

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bawah Perjanjian Kontrak Bangunan. Selain dahpada itu, perenggan 10 Pernyataan Tuntutan dinafikan.

10 Defendan Kedua menafikan Plaintif mengalami apa-apa kerugian atau sedang membayar sewa rumah atau beban faedah bank dan meletakkan plaintiff kepada bukti-buktinya yang khusus. Selain daripada itu, perenggan 11 Pernyataan Tuntutan dinafikan

[18] Clause 10 (in so far was material) and the whole of cl 15 of the building contract that featured in the submissions of the respective counsel, are also reproduced here at the outset.

10 *DEFAULT BY THE CONTRACTOR*

10.1
Each of the following shall constitute an event of default:

10.1.1
If the Contractor shall *wholly suspend* the execution of the construction of the said Building *without good cause* before practical completion;

10.1.2
...

10.1.3
...

10.1.4
...

10.2
...

10.3
If any such event shall occur then, and in any such case, but without prejudice to any other right, remedy or power contained in this Agreement or otherwise available to the Owner, this Agreement may be determined by the Owner *giving written notice to that effect* to the Contractor (such termination to take effect without prejudice to the rights of any party for antecedent breach). (Emphasis added.)

15 TIME FOR HANDING OVER OF VACANT POSSESSION

15.1
Vacant possession of the said Building to which water and electricity supply are ready for connection shall be handed over to the Owner within twenty-four (24) calendar months from the date of acceptance of the loan by the owner or within such other period as may be decided by the Contractor's consultant.

15.2
If the Contractor fails to hand over vacant possession of the said Building with water and electricity supply are [sic] ready for connection to the said

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> Building, under Clause 15.1 above due to the fault of the Contractor, *then the Contractor shall pay to the Owner liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum on the sum already paid by the Owner* to the Contractor under this Agreement. (Emphasis added.)

[19] The learned trial judge, in our view, was correct when she held that the sale and purchase agreement (between the plaintiff and the first defendant) and the building contract agreement (between the plaintiff and the second defendant) were stand alone agreements to be construed separately in the factual context of this matter (see para 9 of the grounds).

[20] The learned trial judge however after referring to the pleaded relief sought by the plaintiff took the position that the plaintiff was ' ... claiming for specific performance and/or damages'. Her Ladyship went on to state: 'Plaintiff has not claimed specific performance and having abandoned that claim went for its alternative claim for damages' (see para 18 of the grounds).

This approach was in our assessment clearly erroneous as the full purport of that prayer (ii) pleaded, namely:

> Ganti rugi alternative *(damages in lieu) atas Perlaksanaan Spesific bagi kelewatan penyerahan* milikan kosong yang masih berjalan sehingga penyelesaian penuh: (Emphasis added.)

was clearly for an order for *damages in lieu of specific performance* for late delivery and not 'damages' arising independently.

[21] Further only at the stage of the closing submission before the High Court was it canvassed by the plaintiff that the contract had been breached (because the works had not been completed). The claim was modified to that effect, and in counsel's words, the plaintiff ought to be restored to the 'status quo' by refund of all monies paid, so that it would serve as a 'deterrent' to errant parties like the defendants (see 'l. Kesimpulan' in written submissions of plaintiff dated 7 March 2013).

[22] The learned trial judge went on then to state that since the second defendant was 'not capable of performing' its obligations it had *breached* the contract and since no specific performance was being ordered by the court, cl 15.1 did not apply. Accordingly, the judgment of the High Court was that the damages the plaintiff was entitled to, was what would naturally arise in the course of things from the breach (see paras 21, 22 of the grounds).

[23] We considered the aforesaid reasoning and conclusion reached by the learned trial judge to be seriously flawed, for various reasons.

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Firstly, it need to be noted that *nowhere* in the statement of claim was there any allegation made, and neither was there a *declaration sought* by the plaintiff, to the effect that the building contract had been *rescinded by non performance*. Further there was *no prayer* for an order for *damages for breach of contract* to be awarded or to be assessed. Prior to the trial or during the course of it, the plaintiff did not seek for any amendments to be made to the pleadings as well. The trial had been proceeded with all along as an action for specific performance of the building contract or for *damages in lieu* of such order for specific performance (and not in addition or as an alternative head of claim).

[24] *Secondly*, it was trite that parties were bound by their pleadings and the court was not entitled to decide a suit on an issue that was not pleaded. The pleadings operated to define and delimit with precision and clarity the matter in controversy between the parties and the court only had to adjudicate on those issues and no more (*Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 (FC); *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615).

[25] *Thirdly*, the learned trial judge had disregarded the evidence of SD2 that the second defendant was willing and able to complete and deliver the building according to the building contract, subject to appointment of new subcontractors.

[26] More to the point, the Court of Appeal in the case of *Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd* [2000] 3 MLJ 310 had occasion in a somewhat similar context to observe as follows:

> The essence of the respondent's claim in the circumstances of this case is for specific performance and the claim for damages for breach of agreement must necessarily be regard as an alternative claim. They cannot get both remedies. If they claim for specific performance, they are treating the agreement as still subsisting and wants the other party to perform it. *If their claim is for damages for breach, they are treating the agreement as having come to an end and therefore incapable of being performed.* As stated earlier *the essence of the respondent's claim is for specific performance and once they abandon this claim, they have altered their claim and their pleadings cannot stand for the purpose of their alternative claim for damages for breach.* They therefore ought to amend their pleadings and without doing so, the learned judge ought not to have ordered damages to be awarded to them. *The respondent cannot be allowed to change the whole nature of their claim which essentially is a claim for specific performance, by turning it into an ordinary action for damages.* (*See Hipgrave v Case* (1885) 28 Ch D 356). (Emphasis added.)

The learned trial judge had definitely misdirected herself in the application of the principles in this area of law, which had found affirmation in the above decision in *Labasama Group*'s case.

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[27] The plaintiff was not here in this case, as pointed out earlier, seeking for a rescission of the contract (arising from failure of performance) but for its performance. If the order for specific performance was declined by the court, the damages in lieu had to necessarily be in the nature of the reasonable costs or expenses that would have to be incurred to complete performance (not to restore the plaintiff to the situation of 'status quo ante'). Specific evidence of such costs and expenses expected to be incurred had to be led before the court. There was no such evidence before the court at all.

[28] Further, in making the orders as to the 'damages', the learned trial judge also omitted the undisputed fact that there had been substantial completion of the building works but had failed to make such necessary consequential adjustment for the benefit or advantage already enjoyed by the plaintiff thereby. By ordering, the 'market value' of the building (as per the contract value in the building contract), the plaintiff would appear to have been accorded an unfair gain from the value already put into the works by the second defendant.

[29] Similarly, there was no comprehensible rationale for the orders that the sums paid towards the MRTA and legal fees on the loan agreement ought to be refunded to the plaintiff. Those outgoings, as it were, were in respect of the loan arrangement entered into by the plaintiff with AmBank (M) Bhd. There was no evidence shown that this arrangement had been terminated (in which case the loan would have been recalled) or aborted as a direct result of the delay in handing over of vacant possession of the building.

[30] We were in agreement with counsel for the second defendant who had submitted that, any such damage recoverable had to be limited to the amount derived by applying the expressly agreed formula set out at cl 15.2 of the building contract, to constitute liquidated damages payable to the plaintiff.

[31] The plaintiff's contention in response to this, was that the plaintiff was entitled to invoke cl 10.3 and in such a situation cl 15.2 was no longer applicable. In other words, it was argued that the contract had come to an end by termination or rescission and cl 15.2 was no longer binding on the parties.

[32] The fallacy behind this contention of the plaintiff however was that, if at all the plaintiff was to avail of that provision (cl 10.3) to put to naught the building contract, the plaintiff had to first establish:

(a) that the second defendant had *wholly suspended* the execution of the building *works without good cause* before practical completion; *and*

(b) that the plaintiff had issued to the second defendant a *written notice to determine* the agreement.

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[33] Upon being questioned by us, counsel for the plaintiff readily conceded that no such written notice of termination of the building contract had ever been issued to the second defendant by the plaintiff and the second limb as aforesaid had therefore not been satisfied in any case.

Further and more materially, the notice of 9 April 2012 issued by the plaintiff's solicitors to the defendants merely complained that '... as at to date you had wilfully and/or neglected (sic) and/or refused do (sic) comply with the terms of Agreements and had failed to deliver vacant possession to our client pursuant to the Agreement.'

That notice went on to further state:

> In the above premises, we have no alternative but to proceed with legal action against you for the wilful conduct in not complying with the terms of the Agreement wherein our client has been put in substantial inconvenient [sic] due to your inaction in providing vacant possession.
>
> Further, TAKE NOTICE that we have our client's instructions that unless you revert to us with a written confirmation within *Seven (7) days* of this notice that you shall comply with the terms of the Agreement, failing which we shall have no alternative but to seek legal remedies including Order for Specific Performance.

[34] In our evaluation, that notice of 9 April 2012 was not intended to nor did it in any event have the effect of being the written notice by the plaintiff to determine the contract as contemplated by cl 10.3 (for reason of wholly suspending the execution of the construction works) in order to take the plaintiff and the second defendant out of the purview of the terms of the building contract. Clause 10.3 of the building contract could not therefore be invoked by the plaintiff in this instance. All terms of the building contract therefore remained and was still binding upon the parties, including cl 15.2, which specifically provided for the agreed measure of liquidated damages to be payable to the plaintiff in the event that there was a delay in the handing over of vacant possession of the building.

[35] It is noteworthy that the Federal Court in *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd* [2010] 1 MLJ 597 had recently ruled that there was no right to rescind a contract despite protracted delay (in handing over vacant possession there too) unless there has been *total failure of consideration or non-performance of the contract in its entirety*. Although some controversy lingers as to whether the 'fundamental breach test' or 'failure of performance of the contract in its entirety test' were the correct one to be applied before an order for rescission (for breach of contract) was allowed, the point to be noted was that in this *Berjaya Times Square*'s case, it was further stated that unless the contract was rescinded, the 'liquidated damages' clause subsist and would continue to bind the parties; damages recoverable were limited to the measure as therein agreed by the parties.

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[36] In the fact situation before us, there was no fundamental breach (as 85% of the works was indisputably completed), and definitely no total failure of consideration or failure of performance of the contract in its entirety. Clause 15.2 continued to bind the parties where there was a delay in the handing over of vacant possession of the building.

[37] Despite the existence of a 'time is of the essence' clause (see cl 3.1 of the building contract), what was obvious here was that by conduct, the plaintiff did not insist on the strict compliance of the deadline for handing over (November 2008) and had waited until 2012 to commence this action. *In the circumstances time had been set at large*. In the *Berjaya Times Square*'s case too, it was also ruled by the Federal Court that where there were both a 'liquidated damages clause for late delivery' and also a 'time is of the essence clause' in the same agreement, the expressly stated liquidated damages would necessarily mean that the 'time is of the essence clause' had been waived as to its strict effect.

[38] As regards the quantum of the liquidated damages agreed to be payable by the second defendant for late completion, firstly it should be stated that there was no challenge mounted by the plaintiff as to its adequacy or reasonableness.

It was our view that the formula spelt out in cl 15.2 for calculation of damages was fair and reasonable in the circumstances as it was an interest payment of 10%pa imposed on all monies that had been paid or disbursed by the financier from the approved loan sum to the second defendant towards construction of the building. It was not shown that such a sum was not sufficient to include within it, expenses incurred by the plaintiff to account of interest payment on the loan sum (already disbursed), any rental for alternate accommodation and other incidentals likely to be incurred for the duration between the expected date of completion and actual delivery of vacant possession.

[39] The law has also recognised that where it is difficult to assess damages or where no known measure of damages was employable or otherwise damages were incapable of accurate assessment, such sums stipulated as 'liquidated damages' in contracts were recoverable as a genuine pre-estimate of damages (see *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 (FC); *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445 (FC).

The majority decision in the Court of Appeal case of *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101 held that it was for a party challenging a liquidated damages clause in a contract, to demonstrate that it was unreasonable, exorbitant or unconscionable and that the courts would in any event generally

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preserve the sanctity of such a clause that had been freely entered into by the parties.

[40] It was our view that in the circumstances of the matter presented before the court, that the plaintiff ought to have chosen to terminate the building contract within reasonable time of the due delivery date or, by way of appropriate proceedings in court elected to treat the performance of the contract as having been terminated (repudiated) by the second defendant. This was not the nature of the suit here. It bears repetition, that this was an action for an order for specific performance as the principal remedy and, for damages in lieu, if specific performance was not granted.

[41] Having given anxious consideration to the matters in issue and the submissions of counsel for the parties in this appeal before us, we were of the unanimous view that the learned trial judge had misdirected herself on the facts and the law in context of the pleadings before the court and the evidence led at trial. This merited appellate intervention. On the facts in evidence, the plaintiff, in our view, was entitled to an order for specific performance as sought.

[42] We were constrained therefore to allow the appeal. All the orders of the learned trial judge were set aside and substituted with the following:

(a) the plaintiff (the appellant) be entitled to specific performance of the building contract; and

(b) the plaintiff be at liberty to claim for damages for delay in delivery of vacant possession in accordance with the liquidated damages agreed and payable by the second defendant under cl 15.2 of the building contract, until date of hand over of the building.

(A similar order was to apply in respect of the plaintiffs in each of the other five cases as well).

We also ordered costs to the second respondent in the sum of RM15,000 both here and at the trial court on an overall basis.

Order accordingly.

Reported by Ashok Kumar